Res Judicata

Sec. 11; Res Judicata; (Statutes):

Res Judicata

11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.–The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.–For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.–The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.–Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.–Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.–Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Model questions: 1. What is resjudicata? What are the *principles and object of doctrine of resjudicata?* 2. What constitutes the 'resjudicata'? Does an exparte decree operates as res judicata? 3. What are conditions for applying the principle of resjudicata: Enumerate few/five characteristics of principle of resjudicata. 4. What is meant by 'former suit' as envisaged in Explanation I to s. 11? What is constructive res judicata? State with concerned provision of law along with two instances thereof.5. In what stage of the proceeding the question of resjudicata may be determined?

Discussions and comments

Resjudicata; what is:

Sec. 11 of CPC, broadly speaking, provides that a court shall not try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same party, 20 DLR 732. The rule of *'resjudicata'* is a rule of procedure which prohibits the Court from investigating into a matter which has already been adjudicated upon between the same parties, no matter whether they are plaintiffs or defendants in subsequent suit, 7 DLR 159. If there is an issue between the parties that is decided, the same operate as res judicata between the same parties in the subsequent proceedings, AIR 2010 SC 818.

"Principle of resjudicata": The principle of res judicata are of universal application as it is based on two age old principles, namely, *"interest reipublicaentsi finis litium"*, which means that it is interest of the State that there should be an end to the litigation, and the other principle is *"nemodebet his veari, se constet curiae quod sit pro un act eademn cause"* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is one for the same cause, AIR 2011 SC 1113, 1916 PC 78, 20 BLD 347 = 6 BLC 163 = 8 BLT 136, AIR 1961 SC 1457, AIR 2015 Chat 165.

This principle has been best elucidated by this court in a case in *10 DLR 621*as quoted- "The maxim is that no one shall be vexed twice over the same matter, which presupposes that the issue has been fairly and finally tried and decided in a former suit, which was independent of the proceedings in which the same matter is again in dispute, 31 DLR 84.

Once an issue has been finally decided, it cannot be re-agitated between the same parties, 24 BLD (AD) 223, 10 MLR (AD) 144, 9 MLR (AD) 294, 13 MLR 13, 20 BLD (AD) 278, 54 DLR 310, AIR 2005 SC 2392.

The principles enunciated in s. 11 of the Code are nothing but codification of a well-known principle of estoppel, namely estoppel by judgment. 19 DLR 30, 45 DLR 347. Res judicata creates a different kind of estoppel namely, estoppel by accord, AIR 2005 SC 626. The principle of *resjudicata* is applicable not merely a technical rule, but on the basis of the codified law but also on the basis of public policy that there should be a finality in a litigation setting at rest the rights and liabilities of the litigants and if the earlier decision is sought to be upset in a subsequent proceeding between the same parties, it is bound to have great unsettling effect on the social life itself, 34 DLR 418, AIR 1997 Bom 79, 7 DLR 159.

The principle of res judicata applies as between two stages in the same litigation so that if an issue has been decided at an earlier stage against a party, it cannot be allowed to be re-agitated by him at the subsequent stage, AIR 2003 SC 649, AIR 2014 Chh 93.

Though the provisions in sec. 11 CPC regarding resjudicata are not exhaustive, but so long as they are applicable to a particular case they must be so applied, 10 DLR 475.S. 11 of CPC is not exhaustive and a Court in order to avoid conflicting judgments on the same question can travel beyond the limits set by the section. 8 DLR WP 93.No party can be permitted to raise an issue *inter-se*where such an issue has been decided in an early proceeding. Even if *res-judicata* in its strict sense may not apply but its principle would be applicable, AIR 1999 SC 431.

Mere showing that a matter directly and substantially in issue in both the suits or cases or proceedings is not enough to attract the operation of principle of res judicata. It has to be shown that such a common issue has been heard and finally decided by the court in the earlier suit or proceeding, 10 BLD 139 = 42 DLR 154, 9 BLD 253, 5 DLR 162.

Object of the doctrine of 'resjudicata':

The main object of the doctrine of *resjudicata* is to prevent multiplicity of suits and interminable disputes between litigants. This being so, the doctrine, so far as it relates to prohibiting the retrial of an issue, must refer not to the date of commencement of the litigation, but to the time when the Judge is called upon to decide the issue, 37 CLJ 184, 11 All 148. The main object of the doctrine of *resjudicata* is to prevent multiplicity of suits and interminable disputes between litigants. The principle of *resjudicata* is intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be vexed again and again in multiple of proceedings over the same question. This principle is mutual in character and it is open as much to the plaintiff as to the defendant, 17 BLD 336, 45 DLR405, 10 DLR 621.

What constitutes the 'resjudicata':

(i) Firstly, 'final decision' operates as bar of resjudicata:

It is the decision not the decree that creates a bar of resjudicata. A final decision whether right or wrong operates as resjudicata even though no decree is drawn up, 11 BLD 256 = 43 DLR 644 para 2, AIR 1963 Bom 263. Determining factor of resjudicata is not the decree but the decision, 10 DLR 621. It has been consistently laid down in all leading decisions that it is the judgment, and not the decree passed thereof which attracts principles of resjudicata, AIR 1927 Lah 289, PLR 7 Dac 209.

It is the subject-matter in issue and not the subject-matter of the suit that forms the essential party of Resjudicata. The subject-matter of two suit may be different, object of the suits, the relief asked for and the cause of action may also be different but if the matter in issue in them be identical, then the principle of *resjudicata* will of course have its application, 8 BLD 493.

(ii) Secondly, "not only the decision, but also the findings in the judgment operate as resjudicata":

Not only the decision, but also the findings of the former suit operate as res judicata, AIR 1932 Cal 496, 7 BCR (AD) 426, 9 ADC 678 *subst.*, 25 BLT 564 *subst.*, 12 BLD (AD) 296. Only the 'matter in issue', not the 'subject matter of the suit', forms the basis of the res judicata,20 DLR 732, 1 BLD (AD) 221. The previous decision on a matter in issue alone and not the reason for the decision is res judicata. 17 DLR (SC) 545, AIR 1971 SC 2335.

The finding with respect to ext. Ga arrived at by learned Munsif in T.S. no. 35/54 operates as resjudicata on a finding to the contrary in respect of ext. Ga in the present suit and the finding of the Munsif in the previous suit in this respect stands as final by operation of law, 3 LNJ 572. Question is whether the tenancy is permanent or not cannot be subject matter of the present suit, because that question has been set at rest by the decision in the previous suit between the parties. Thus the previous decision is binding on the parties, 6 DLR 1.A non-speaking judgment/order does not operate as resjudicata, AIR 2005 SC 3708, AIR 1997 SC 1796.

(iii) Contrary situations – which decisions or findings do not form resjudicata –

(a) "findingsmade incidentally beyond the issues do not operate as res judicata": "A decision is not resjudicata, if the decree is not based on it but is made inspite of it". This principle was made clear by the Privy Council in Raja Run Bahadoor case *(12 IA 23)* which has been followed in subsequent cases as the leading authority on this question, 5 DLR 285. A finding on a matter which is not necessary for disposal of the suit and which was not made the basis of the decree cannot be said to have been substantially in issue. AIR 1927 PC 102.

In a writ petition, the HCD unnecessary commented on the petitioner's title to and possession of land in a manner favourable to the writ petitioner. Held: It was absolutely unnecessary to comment on the petitioner's title to and possession of land in a manner favourable to the writ petitioner. Those findings will not

be taken into account as a finding of fact or law either by the trial Court in the suit or by any other court in any future litigation regarding the title,52 DLR (AD) 43 = 19 BLD (AD) 300.

Though the authorities under the Rent Control Laws may have to pronounce on the relationship of landlord and tenant between the parties to exercise jurisdiction vested in them under the statutes but their decisions would not be binding on the parties and cannot operate as *resjudicata* in a subsequent suit. AIR 1981 P&H 237. The decree in the previous suit was not based on the finding that the tenancy was not a permanent one but on the finding that the notice to quit, which was served on the defendant, was not good, 5 DLR 285. Where there are several issues, the decision on each is *resjudicata*. But if a decision on an issue does not support the ultimate decree, it does not operate as *resjudicata*. 73 CLJ 475, 5 DLR 285.

The expressions 'collaterally and incidentally in issue implies that there is another matter which is "directly and substantially" are in issue, AIR 2000 SC 1238. When the issue decided in the title suit was not directly and substantially in issue in the partition suit, the decision on the question of title in title suit operates as a res judicata. The decision on the question of title given in the title suit could not be collaterally attacked in the appeal from the decree in partition suit, 1 BLD (AD) 221.

Contrary situations - In an earlier money suit for price of borga crops the court gave decision upon title of suit lands. Thereafter, defendants filed a suit for declaration of their tenancy right. Held: After the defendants herein succeeded in establishing that plaintiffs of this suit were their bargadas in respect of the suit lands, it cannot be held that the question as title was merely incidentally looked into so that a fresh look at the same question can be given in the present suit, 6 BLD (AD) 194.

(b) Findings beyond jurisdiction of the court not operate as res judicata":

An order passed without jurisdiction would be a nullity. It will be a *coram non judice* and it is *non-est* in the eye of the law. The principle of *res judicata* would not apply to such cases, AIR 2007 SC 115, AIR 2012 SC 1693, AIR 2009 SC 1645, AIR 2016 SC 2336. The principal of res judicata is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like, estoppel, waiver or *res judicata,* AIR 2004 SC 2836. A judgment delivered by a court not competent to deliver it cannot operate as *resjudicata.* AIR 1958 Bom 30. In a suit for mere permanent injunction the trial decreed the suit and decided the title of the parties of the suit. Held: Trial court exceeded its jurisdiction in deciding title. The factum of title of the parties would remain open to be decided in an appropriate forum. 54 DLR (AD) 73 para 6.

Contrary situations – A decision under this sec. 9 operates as *res judicata,* 37 CWN 1148, 57 CLJ 549. Where in a suit u/s. 9 be question as to whether or not the dispossession was in due course of law was finally decided, the decision would operate as res judicata in any subsequent litigation, PLD 1937 Lah 125, AIR 1933 Cal 923.

(c) Findings in summary proceeding may not operate as resjudicata in civil suits: A question regarding title in a small cause suit may be regarded as incidental only to the subsequent issue in the suit; hence the finding of title rendered by small cause court cannot operate as *res judicata* in a subsequent suit for determination of any question of title or right in the said property, AIR 1969 SC 78, AIR 2013 SC 3099, AIR 1991 SC 884. The first suit was for declaration that the order of redemption passed by SDO is null and void. The court decreed the suit on contest. Then the same defendant filed another suit for cancellation of the said decree. The HCD found that in earlier case the trial was beyond jurisdiction of any civil court. As such it decreed the latter suit, 17 BLC 764 para 22.

Observations about title made in the impugned decree passed in a summary suit u/s. 6 (sec. 9 in Bd) does not preclude the parties from raising contentions in the substantive suit to establish title and for recovery of possession. 2005(1) CLJ 1 (SC), AIR 1969 Mani 49.A claim proceeding u/o. 21 r. 58 is not a suit or a proceeding analogous to a suit. An order in such proceedings does not operate as res judicata, AIR 1967 SC 1390. The issue of co-sharership in the tenancy settled in pre-emption proceeding is not barred by principle of resjudicata, 7 ADC 568.

Contrary situations –Petitioners herein filed a suit for declaration that the decree in questionwas void; the suit was dismissed on contest. Then they filed the instant application u/o. 21 r. 100 for restoration of possession. Trial Judge dismissed the case on ground of barred by resjudicata. Held: Though this is a miscellaneous proceeding, but a suit in which "the right to property or to an office is contested is a suit of Civil nature" and therefore the present proceeding is a suit of civil nature and the principle of *res judicata* must have its application in the instant proceeding as well, 8 BLD 493.

More see under heading of pre-emption proceedings, writ proceedings, etc.

(d) Adverse finding against a successful party usually does not operate as res judicata: When a party succeeds in a suit or a proceeding, an adverse finding against him cannot be made the foundation of a plea of *res judicata* in a subsequent suit between the same parties. 10 DLR 277, 71 DLR 474, AIR 1926 672, AIR 1922 PC 241, AIR 1960 Cal 440. If the plaintiff's suit is wholly dismissed, any issue decided against the defendant cannot operate as *res judicata*. AIR 1924 Mad 469. If the plaintiff's suit is decreed in its entirety, an issue decided against him cannot operate as res judicata. AIR 1944 Nag 154.

Contrarily, –General principle is that an adverse finding against a defendant when the suit is dismissed is not *resjudicata* in a subsequent suit inter-parties. But if the adverse finding is

actually the decision of the suit and it forms a fundamental part of the decree itself, then it will operate as *resjudicata* inspite of the fact that the decree is one of dismissal. 40 DLR (AD) 56 = 8 BLD (AD) 14, AIR 1967 (J&K) 85, 1929 Cal 449, 20 BLD 179 para 25.Adverse finding in the judgment in an earlier suit dismissed on the ground of maintainability cannot operate as *resjudicata*. But the finding that the defendant was admittedly a tenant-in-will operates as admission by judgment, 47 DLR 160.

(e) Findings made in interlocutory matters do not operate as res judicata:

See u/s. 94.

Conditions for applying the principle of resjudicata:

From provisions of sec. 11 CPC, we find that following matters are essential conditions for resjudicata; such as –

(i) Two suits, one former suit and the other subsequent suit;

(ii) same issue, may be directly or substantially;

(iii) same parties, or their legal representatives;

(iv) court of competent jurisdiction;

(v) issue of former suit was finally decided/adjudicated;

(vi) parties are litigating under same title.

Discussions upon the above mentioned points –

(i) Two suits, one former suit and the other subsequent suit:

To bring a case within ambit of sec. 11 CPC the issues in the former suit and the subsequent suit shall be the same, the suits should be between the same parties, the subject-matter should be the same and the former suit must be disposed of finally, 16 BLD 549, 59 IA 247, 12 DLR 433, 45 DLR 179.

More see below under Explanation I.

(ii) Same issue, whether directly or substantially:

When the parties and the subject-matter in the both earlier and later suit are the same and the matter in issue as to the loss sustained by the plaintiff due to the reasons stated in the written-statement of the earlier suit and plaint of the subsequent suit are materially and substantially the same, as such the suit is hit by *resjudicata*, 52 DLR 434. The expression 'the matter' in this section connotes that it must be one which is asserted by one party and denied by other party. Mere allegation by one party is insufficient to bring it within the purview of such 'matter', 18 DLR 494. When the issue decided in the title suit was not directly and substantially in issue in the partition suit, the decision on the question of title in title suit operates as a res judicata. The decision on the question of title given in the title suit could not be collaterally attacked in the appeal from the decree in partition suit, 1 BLD (AD) 221.

Even if the subject matter of two suits may be different, the object of the suits, the reliefs and the causes of action may be different, but if the matter in issue in them is identical, i.e. if the same title had been litigated before, resjudicata will apply, 60 DLR 25, AIR 1953 SC 33, AIR 2003 4295, 12 BLC 92, 7(2) LNJ 293, AIR 1977 (SC) 392, AIR 1998 (SC) 2046, 42 DLR (AD) 126 = 10 BLD (AD) 52, 17 DLR (SC) 105.

The prayer (a), i.e. decree for declaration that required notices u/s. 5 of the Requisition of Property Act, 1948 have not been served in LA case in respect of the suit property, has already been decided in earlier T.S. no. 36/68. This means that the issue of service of notice, as required by law, has already been decided. It is barred by res judicata. 40 DLR 554. The question of title of this suit had already been decided in the former redemption suit. In that suit Chandrabala wanted to be impleaded as co-plaintiff and share the fruits of redemption but her prayer was rejected. The suits were decreed for redemption - I see no reason why the decision in that suit would not operate as *resjudicata* in the present suit. 5 BLD 274.

In earlier suit the State took plea that the temple in question was a Hindu temple. The court opined that it was a Jain temple, not Hindu. The State, therefore, cannot still contend that the

temple is a Hindu temple. The issue having been decided earlier cannot be allowed to be reopened, AIR 2007 SC 767.Previous suit for declaration of title was dismissed for non-proof of title. Subsequent suit on same issue but on new grounds would be hit by res judicata, AIR 2011 AP 88. Previous suit was withdrawn on 27.3.69 with permission to sue afresh on the same cause of action. Present suit was instituted on 03.8.85. Held: Earlier suit was for correction of record of right and present suit is for declaration of title. Therefore, the subject matters are different. Causes of actions are also not same. The suit is not barred. 24 BLD 101.

An issue raised in a suit for restitution of conjugal rights may operate as res judicata in a suit for separation. AIR 1972 All 52, 25 DLR 21.The question whether a matter was directly and substantially in issue in the former suit has to be decided (a) on the pleadings in former suit, (b) the issue struck therein, and (c) the decision in the suit. AIR 1965 SC 948.Previous suit was for specific performance of contract; wherein this plaintiff was added as deft and contested the suit. The suit was decreed holding that the agreement for sale was genuine and the suit property was not enemy property. Thereafter he filed the instant suit for declaration that the said decree is void claiming that said bainapatra was false and forged and suit land is enemy property. Held: The allegations which have taken in this suit have already been settled in earlier suit and as such this suit is barred by res judicata. 6 BLT (AD) 51 = 2 MLR (AD) 291.

If issues are different, not barred – When an issue was not raised in a previous suit because of the 'form' of the suit, judgment of that suit would not operate as *res judicata* in a subsequent suit embracing this issue, AIR 1935 Cal 642, AIR 2004 SC 508.

The decree for specific performance of contract shows that it has only decided the controversy between the vendor and the vendee. There is no declaration in the case that the building is not an abandoned property or that it has not vested in the Govt. under P.O. 16/72, so the decree is not of any use for the writ petitioner,1

XP (AD) 169 para 13.Decree for declaration of title in earlier suit does not play as res judicata in a latter suit, if title to the same lands again be clouded, 17 BLC 804.

The Bankruptcy suits are not barred by the principles of res-judicata due to passing of decree by Artha Rin Adalat in favour of the plaintiff of the Bankruptcy suits and against the defendants of those suits, 52 DLR 138.When the causes of action of the two suits are different and the subject-matter of the two suits is also completely different, the decision in one suit cannot be considered as *res judicata* in the other suit, 16 BLD 96.First application was u/o. 21 r. 58 of CPC, which was dismissed; then same petitioner filed application u/r. 97. Latter application is not barred by *resjudicata*, AIR 2014 AP 124. Unless the question as to the amount of rent payable on the construction of the lease was raised and decided in a previous rent suit the decision cannot operate as res-judicata in a subsequent rent suit, 6 DLR 58 = 12 BLT 517.The earlier suit was based on the settlement deed executed by the plaintiff's husband in her favour; dismissal of said suit will not be a bar for making a claim for her share, if any, of the family property, if otherwise permissible in law. The subsequent suit for partition of half-share in the property based on her birth right. Cause of action is entirely different, AIR 2016 SC 1134.

More see below under explanation VIII.

Directly and substantially in issue: A finding on a matter which is not necessary for disposal of the suit and which was not made the basis of the decree cannot be said to have been substantially in issue. AIR 1927 PC 102. If the matter is directly and substantially in issue, it is immaterial that the nature of the two suits are different. AIR 1954 Pat 443.Where a person was sued on the basis that he was either a tenant or a licensee and the court held that he was only a licensee, he cannot later sue claiming that he was a tenant. AIR 1982 SC 1097.

A matter in respect of which no relief is claimed cannot become directly and substantially in issue even if a decree is passed by a competent court. AIR 1989 SC 2240.Suit for injunction; issue of title involved. Decision operates as *resjudicata* in a later suit based on title. (1994)2 SCC 14, 24 BLD (AD) 163.The principle of res judicata comes into play when by judgment and order in a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication even then the principle of res judicata on that issue is directly applicable. AIR 2010 SC 818.Since the disputed properties were declared as not vested property, the said declaratory decree passed earlier suit cannot be questioned in subsequent partition suit by filed Govt., 56 DLR 525, 2 MLR (AD) 218.

More see below under headings(i) Findings beyond issues or beyond jurisdiction of the court do not operate as res judicata, and (ii)If a suit be dismissed only on technical ground, a properly framed subsequent may not be barred by res judicata, etc.

(iii) Same parties or their representatives:

To constitute res judicata, it has to be shown that the matter in issue had been decided between the same parties or between parties under whom they or any of them claim. AIR 1979 SC 551, AIR 1990 Bom 134, 2010 AIHC 382.All the parties in both the suits need not be identical - but it is necessary that the parties in the former suit are also parties in the latter suit, 18 DLR 494.

An issue decided earlier operates as res judicata not only against employees who were parties in an earlier case but against the whole class or category to which they belong, AIR 1991 SC 1134. The petitioners having not been made parties in the suit are not bound by the decree passed in the suit and the decree would not operate as res judicata against the third parties who are not adversely affected, 1 BLC 1, PLD 1963 Lah 566.

It is now settled law that judgments not *inter parties* are inadmissible in evidence except for limited purpose of proving as to who the parties were and what was the decree passed and the properties which were the judgment of the suit, AIR 1983 (SC) 684,

AIR 1942 (PC) 40, AIR 1937 PC 69.Where in a previous suit a party of a subsequent suit was impleaded in his representative capacity as an heir of the original tenant and it was not open to him to raise any defence in his personal capacity he can subsequently raise objection and his hereditary nature in the previous suit does not operate as res-judicata. 43 DLR 601.

Since in the previous suit the plaintiffs herein or their predecessors were not parties, the judgment passed in the said suit cannot operate resjudicata. The principle of resjudicata will not be attracted when it is proved that the earlier judgment was obtained by fraud and collusion as prescribed by sec. 44 of Evidence Act. But the previous judgment is admissible u/s. 13 of Evidence Act only to show that there was previously instituted another suit in respect of the same properties and nothing more, 1 LNJ (AD) 3, AIR (1983) SC 684, 44 CWN 935 = AIR 1941 Cal 193.

A transferee from a party to the suit is not bound by resjudicata if the transfer took before the suit was instituted. AIR 1948 PC 168.A mortgagee is not bound by a decision against the mortgagor in a proceeding instituted after the mortgage. AIR 1970 Pat 50. Where the first suit was brought to enforce the right to partition and separate possession, and the second to get possession from a trespasser on the basis of title, it was held that the subject-matter was not the same although there was identity of some of the issues, AIR 1970 SC 987.

More see below in discussions under explanation VI.

Resjudicata may constitute against proforma defendants too:

Even in the case of *proforma* defendants they are ordinarily bound by a decree which has been obtained in their presence. The decision in a former suit to which a pro-forma defendant was a proper party and which affected the interest of the *proforma* defendant as well operates a resjudicata in a subsequent suit between the same parties, even if no relief was claimed against the pro forma defendant in the earlier suit, 12 DLR 433, AIR 1942 Cal 1.

Plaintiff filed the earlier title suit against third party for declaration of title to a portion of land covered by the deed of hiba-bil-ewaz wherein his sisters were made *proforma* defendants along with others. Suit decreed on contest against principle defendant and ex parte against *proforma*-defendants. Held: The entire issue involving the hiba-bil-ewaz is now *resjudicata*, 12 BLD (AD) 296.

Contrarily, proforma defendant is not barred by resjudicata – A decision in a suit in which a party is joined as a *proforma* defendant without any relief being asked for against him, is not *res judicata* against him on a point affecting his interest decided between the principal parties, 5 DLR 248, 17 DLR 373. A party though described as proforma in a suit would be bound by a decree passed in his presence after he has contested the suit by filing a written-statement making an adverse claim against the property in the suit. But non-contesting proforma defendants would not be bound by the decree if they were not necessary parties and if no relief was sought against them. 40 DLR 340 = 9 BLD 29, 8 BCR 156, AIR 1947 Bom 217. A decision in a suit in which a party is joined as a *proforma* defendant without any relief being asked for against him, is not res judicata against him on a point affecting his interest decided between the principal parties, 5 DLR 436.

Res-judicata may constitute even between co-defendants or between co-plaintiffs: The requisites for the application of the rule of res judicata as between co-defendants are three: (i) There must be a conflict of interest between the defendants concerned; (ii) The conflict was decided in order to give the plaintiff's relief of the suit; and (iii) The question between the defendants must have been finally decided. But if the plaintiff's decree does not require or involve in any case between co-defendants, the co-defendants will not be bound by the said decree, 5 DLR 246, 3 DLR 402, AIR 1995 SC 1205. The Privy Council held that a decision may be *resjudicata* against co-defendants as well if there was conflict between them, 53 ILR (PC) 103, AIR 1931 PC 114, 40 DLR (AD) 56 = 8 BLD (AD) 14.

The principle of res judicata binds co-defendants if relief given or refused by earlier decision involved a determination of an issue between co-defendants, AIR 2005 SC 2499, 2005 AIHC 3201(Bom). Res-judicata between co-defendants R & P; the suit being decreed against R and dismissed, over-ruling his contention, against P who having a right to appeal did not appeal. Subsequent suit by P covering the same point against R isbarred by res-judicata, 6 DLR 514.

(iv) Competent to try the subsequent suit:

Another condition for resjudiciata is that the court wherein the former suit was tried is competent to try the subsequent suit too. Explanation II to this sec. 11 additionally explains that such competence of court shall be determined irrespective of any provisions of right of appeal from decision of such court.

Judicial pronouncements– One of the requirements for coming within the purview of former suit, though it is not absolute in all circumstances, is that the court which tried the former suit must have jurisdiction to try the subsequent suit as well, 31 DLR 84, CWN (XII) 359, that is, the two courts must have concurrent jurisdiction, ILR 9 Cal 439(PC). In order to come the subsequent suit within the mischief of sec. 11, the first and foremost requirement is that the Court in which former suit was pending and/or decided must be competent to try subsequent suit. Said Court must be of concurrent jurisdiction both in respect of pecuniary jurisdiction and subject. 12 BLT 517 = 56 DLR 588, AIR 1966 SC 1332, AIR 1977 AP 143.

Whether the court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that court at the date of former suit and not to its jurisdiction at the date of subsequent suit, 19 CWN 1280. On general principles of *resjudicata* the decision of court of exclusive jurisdiction will be conclusive of the matter decided irrespective of limitation that the former court must be competent to decide the subsequent suit. AIR Oudh 199, AIR 1935 Cal 816.

A judgment delivered by a court not competent to deliver it cannot operate as resjudicata. AIR 1958 Bom 30. The relevant point of time for deciding the question of competence of the court is the date when the former suit was instituted and not the date when the subsequent suit is filed. AIR 1971 SC 2228, AIR 1954 SC 9, 13 DLR 89. The word 'suit' occurring in 'in a court competent to try such subsequent suit' includes the whole of the suit and not a part of the suit or an issue in a suit. It is the whole of the suit which should be within the competence of the court at the earlier time and not a party of it. Mentionable that this view of Indian S.C. was upheld by the Privy Council, AIR 1962 SC 214, AIR 1971 SC 2228.

A plea of res judicata on general principles can be successfully taken in respect of judgments of courts of exclusive jurisdiction. These courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statue, AIR 1953 SC 33.

Contrary situations; where other court's suits also barred by resjudicata– It is true that ordinarily the decision of an issue in a court of lower pecuniary jurisdiction will not operate as resjudicata in a subsequent suit filed in a court of a superior jurisdiction and triable only by such court. But it is not open to a plaintiff to evade the bar of resjudicata by joining several causes of action against the same defendant or defendants in a subsequent suit instituted in a court of higher pecuniary jurisdiction, AIR 1945 Bom 45.

In a case *resjudicata* was sought to be avoided by plaintiff by showing enhanced value of the suit land in the subsequent suit. The previous suit was tried by a munsif as it was within his pecuniary jurisdiction but when the value of the suit land increased at a subsequent time, another suit was filed before the subordinate judge showing higher valuation of the suit. Held: A subject-matter once finally determined between the same parties by a court of inferior jurisdiction will not cease to be *resjudicata* by reason of a subsequent rise in the price of subject-matter which a higher court is competent to try, 13 DLR 89.

A plaintiff cannot evade the provisions of sec. 11 by combining several causes of action against the same defendant in a subsequent suit and instituting it in a court of superior jurisdiction, so also he cannot avoid sec. 11 by splitting up the cause of action of the previous suit, so as to give jurisdiction to an inferior court, AIR 1945 Bom 67, AIR 1935 Cal 792.

(v) Issue of former suit was finally decided/adjudicated:

To constitute a decision of a former suit as *resjudicata,* it is well settled that one of the essential conditions is that there must be a formal adjudication between the parties after full hearing. In other words, the matter must be finally decided between the parties.ILR 24 Cal 616, AIR 1980 SC 161, (2002) 3 SCC 258.It is not necessary that there should be express finding on the issue in question. When a question is decided by necessary implication, though not in explicit terms, it would also operate as resjudicata. But where issue is left untouched and undecided, bar of resjudicata will not operate, 11 BLD 256 = 43 DLR 644, 52 DLR 434.

The previous pre-emption case was rejected on preliminary point of maintainability, i.e. immaturity of the case, and no decision on other issues relating to status of co-sharer of the pre-emptor was given; it does not operate as resjudicata in subsequent pre-emption case on the self-same cause of action, 11 BLD 256 = 43 DLR 644. In order to be finally decided, the decision in the former suit must have been made on merits. AIR 1966 SC 1332, AIR 1971 SC 664, 16 DLR (WP) 157.

A decree in a suit expressed to be "subject to the final decision of the higher court" in another case is not a final decision. AIR 1942 PC 8.When an issue is raised and decided by the trial court but in appeal neither affirmed nor reversed, that cannot be said to be finally decided and the decision of the trial court would not act as resjudicata, 56 DLR 530 = 13 BLT 221, 1985 SCMR 464.

Thus, unless an issue directly and substantially raised in the former case, is heard and decided by the competent court, the

principle of res judicata will not be attracted, AIR 2010 SC 2171. Where a decree on the merits is appealed from it loses its finality and becomes *res sub judice* and it is the decree of appellate court which will then be res judicata. AIR 1966 SC 1332, AIR 1971 SC 2070.

If an appeal from the decision in the former suit is pending, the decision cannot be res judicata. AIR 1931 PC 263, AIR 1982 Bom 437. Where the apex court in Leave Petition has not recorded any finding about concluding the sale, the subsequent writ petition would not be barred, AIR 2011 SC 2060.It is settled that an appeal is a continuation of the suit. When an appeal is preferred, the whole matter is at large before the court. Hence, when appeal is preferred, until the appeal is disposed of, the decision does not attain at finality in the eye of law and as such principles of res judicata will not apply, AIR 2015 Gau 136.

More see under heading When the former suit was disposed on preliminary issue.

Whether compromise or consented decree adjudicates a dispute finally and thereby it operates as res judicata:

See u/o. 23 r. 3 under heading of Compromise or consented decree operates as res judicata, and even if may not, yet operates as estoppel.

(vi) Litigating under the same title:

The last condition for applicability of res judicata is that the parties to the subsequent suit must have litigated under the same title in the former suit. The expression "title" under this head refers to the capacity or interest of a party; it has nothing to do with the particular cause of action on which he sues or is sued, AIR 1951 Cal 574. Same title means same capacity and title refers not to the cause of action but to the interest or capacity of the party suing or being sued. AIR 1942 Bom 322, AIR 1944 Lah 282. The party must either be a party in the former suit or he must claim through a person who was a party in that suit; when a plaintiff in latter suit does not claim through his father who was party to the former suit, res judicata will not apply. AIR 1989 All 202, AIR 1959 AP 448.

If the same party is a party in different character in the two suits, the decision in former suit cannot operate as res judicata in the latter suit. AIR 1955 Mad 533, 11 BLD 33.A benamdar represents a real owner although the latter may not be impleaded and it is well settled that in a proceeding by or against the ostensible owner, the person beneficially entitled is fully affected by the rules of res judicata. AIR 1918 PC 140, AIR 1969 SC 316. In T.S. no. 413/66 Jongal Moral failed to prove his relationship with Danu. Said Jongal being unsuccessful in said T.S. no. 413/66, the defendant-petitioners are precluded from claiming the share of Jongal. 17 BLT (AD) 219.A prior suit against a party in his personal capacity is not res judicata in a latter suit by him as a *mutawalli* as he is not litigating under the same title. 68 CLJ 293.

Where several persons sued as shebaits, the decision rendered therein is not res judicata if they subsequently sued as executors under a will. AIR 1962 Cal 616. The decision in the former suit is binding on the real owner unless it is shown that the ostensible owner did not in fact represent the interest of the real owner in the former suit. AIR 1982 Cal 571, AIR 1977 Mad 292. When a suit is instituted by a person claiming to be the sonamdar, i.e. real owner, on the assertion that the ostensible owner is a benamdar of the plaintiff and the suit is decreed or dismissed, it will not operate as a bar to the litigation of the same question of benami at the instance of a third person claiming that the ostensible owner is his benamdar, 13 DLR 121.

Discussions upon the explanations to sec. 11:

1. Explanation I; 'Former suit': The meaning and scope of the expression "former suit" has been clarified by introducing Explanation 'I' to sec. 11 of the Code. The expression "former suit" contemplates a suit which has been decided earlier than the suit in question, irrespective of the fact of the suit being instituted prior or after the institution of the suit in question. If two suits are filed one after another and the same question is in controversy, the decision in the later suit if given earlier operates as resjudicata, 1 BLD (AD) 221= 1 BCR (AD) 120, AIR 1963 SC 1, AIR 1968 Raj 81, AIR 1977 SC 1268.

The term 'former suit' means previously decided suit though in fact that is instituted subsequent. AIR 1957 AP 992.Findings in a subsequent suit previously decided shall operate as res judicata in a suit instituted earlier, AIR 1932 Cal 496.

Contrary situations - But the principle given above is not applicable in a case where several suits involving common issues between the same parties are disposed of by one judgment, decrees being passed in each, but one decree is appealed from, the matter decided in the decrees not appealed from does not operate as resjudicata to the appeal, 1 BLD (AD) 221 para 15, 7 PLR Dac 209.

Where decisions were given in two suits simultaneously, it cannot be a decision in the former suit, AIR 1968 Raj 81. Where two appeals out of same decree were filed; one was dismissed. The decision of former appeal does not operate as res judicata in subsequently heard appeal when question in issue in latter appeal could not be and was not considered in former appeal, AIR 1973 SC 1269.

2. Explanation II; Concurrence/competence of jurisdiction:

See above under heading of Competent to try the subsequent suit.

3. Explanation III; The matter of the forger suit is alleged by one party and denied by the other in present suit:

See under headings of 'same issue', 'findings, not the decisions operates as resjudicata' etc.

4. Explanation IV; Constructive res-judicata:

The doctrine of constructive *resjudicata* which, in essence and in substance, is a principle of estoppel, 17 DLR 373.The bar of constructive res judicata is not apply only if a party omits to include one of the several causes of action arising out of the same set of facts, and not when different and independent causes of action arise out of altogether different set of facts, AIR 1999 SC 1136. Even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being

taken in the second suit in view of the principle of res judicata. This is the case of constructive resjudicata, AIR 2011 SC 9.

In T.S. no. 73/93 plaintiffs prayed for declaration of title in suit lands which was dismissed considering the deeds of defendants. Subsequently said plaintiffs filed T.S. no. 65/94 for declaration that defendant's kabala deed dated 12.3.69 was forged, void and of no legal effect. Held: It is constructively in issue when it might and ought to have been made a ground of attack or defence in the former suit, but has not been done with reference to title sued must be pleaded, if necessary in the alternative, for the plaintiff will not be allowed to make out a fresh case afterward. The courts below rightly held that the suit is barred u/o. 2 r. 2 of the Code. 7(1) LNJ 103, 25 BLT 564.

The principle of resjudicata and constructive resjudicata embodied in sec. 11 of CPC are not exhaustive. The said principle is constructively applied to cases where a party could and should have agitated the issue in a former suit. He is estopped from agitating the same in a later suit, if he had not raised it in the former. The principle of constructive resjudicata will depend on the facts and circumstances of each case. 17 DLR 373.Principles of constructive res-judicata can be extended in proper conditions where provision of s. 11 does not strictly apply. If a decision is given in a legal proceeding and things are adjusted in accordance with that decision and if after a long lapse of time the said decision is sought to be upset in a subsequent proceeding between the same parties, it will have a great unsettling effect on the social life, 27 DLR 541, 56 DLR 530 = 13 BLT 221.

The raising of a new plea of establishing a new relationship, i.e. a trustee and beneficiary between the parties, having not been raised in the earlier suit, it must be deemed to be barred by constructive *resjudicata* in the subsequent suit between the parties. If the subject matter in 2nd suit is deemed to have been directly and substantially in issue in the earlier suit, 34 DLR 418.

More instances of constructive resjudicata –A judgment-debtor is bound to raise all possible objections in answer to an application for execution u/o. 21 r. 11, and cannot be allowed to raise fresh objection in a subsequent stage of the execution proceedings when an application is made for attachment u/o. 21 r. 54, 11 DLR 151, 2 DLR 205. If the judgment debtor fails to raise the question of want of jurisdiction of the court in execution a decree in the previous stages of execution, he cannot raise the question for the first time at a later stage. Even in execution cases there may be res judicata by operation of principle analogous to the explanation IV to sec. 11, 2 DLR 347.

Objection as to the sale ability must be raised before it order of execution is made u/r. 23 of Or. 21. If the objection is not raised, it will be deemed to have been decided and will operate as constructive res judicata, AIR 1969 Pat 251. In a suit for permanent injunction the plea of adverse possession by plaintiff was not raised in that suit even though available to him. Held: Plaintiff cannot be allowed to raise that plea in subsequent suit as it is barred by constructive res judicata, AIR 2014 Del 1.

Since it is decided in a writ petition between the same parties that the land in question was never de-requisitioned and RAJUK was entitled to deal with it phase by phase which having been affirmed by the Appellate Division the plaintiffs' claim for injunction in respect of the suit land appears to be not maintainable in law. Even the plaintiffs cannot raise the very same question invoking the doctrine of promissory estoppel which is also barred by the principle of constructive *resjudicata*, 2 BLC 584 = 2 BLC 588 = 50 DLR 249, AIR 1968 (SC) 1970, AIR 1965 (SC) 1514.

If former suit was dismissed only for want of furtherrelief, subsequent suit with said furtherrelief though not barred by resjudicata, but may be barred by constructive resjudicataw/s. 11 exp. IV or w/s. 12 read with or. 2 r. 2:

It is a burning question that if the former suit was dismissed only for want of further or consequential relief, then whether a subsequent suit along with the said required further/consequential relief is barred by resjudicata. In answer to this query, we find that though such subsequent suit is not plainly barred by resjudicata u/s. 11; but such a suit may be barred by constructive resjudicatau/exp. IV of sec. 11, or u/s. 12 read with or. 2 r. 2; in different situations, which differs case to case.

Instances when subsequent suit with consequential relief were barred - Where plaintiff in earlier suit for declaration and injunction did not ask for possession whereas he sought such relief in subsequent suit; subsequent suit was hit by Provision of Or. 2 r. 2 CPC, PLD 1996 Kar 458. Unless a case falls within the ambit of sec. 42 of S.R. Act, if the plaintiff is able to claim a mandatory injunction or the specific performance of contract but does not do so, the court must not grant him leave to reserve the right to bring another suit afterwards, since it might lead to multiplicity of proceedings and also might amount to abuse of the process of the court. AIR 1961 MP 102.

Former suit was for permanent injunction against defendants; the suit was dismissed. Then same plaint filed another suit against same defendants for declaration of title and recover of possession. The suit was held to be barred by constructive *resjudicata*, AIR 2005 SC 4004.Plaintiff's suit was for declaration that the V.P. Case is illegal, collusive and void. Held: As the plaintiff does not have title to the entire suit land the greater part of which is in fact an enemy and vested property he is not entitled to a decree he prayed for. He might seek remedy by way of partition in an appropriate forum, 41 DLR (AD) 107 = 9 BLD (AD) 9.

Two suits, the earlier suit was for declaration of title and the latter for declaration of title and recovery of possession. The learned counsel for the plaintiffs canvassed that the earlier suit was of mere declaration of title whereas the instant suit is for

declaration of title and recovery of possession and as such resjudicata is not present here. Held: This point of submission has no substance. In view of Explanation IV to it, the sec. 11 clearly comes into play. Besides, the earlier suit was failed not only for want of consequential relief, but because plaintiff failed to prove the totality of his case, including his title. As such the suit is barred by resjudicata. 42 DLR (AD) 57 = 9 BLD (AD) 164, 6 DLR 1.

The declaration of title is barred in view of earlier partition suit between the same parties relating to the same land; also held that when the dispute over the title of the land was decided earlier in a partition suit between the same parties subsequent suit on the same issue is barred, 2 MLR (AD) 218. The learned counsel for the plaintiffs canvassed that the earlier suit was of mere declaration of title whereas the instant suit is for declaration of title and recovery of possession and as such resjudicata is not present here. Held: This point of submission has no substance. In view of Explanation IV to it, the sec. 11 clearly comes into play, 42 DLR (AD) 57 = 9 BLD (AD) 164, 6 DLR 1.

Contrary situations; instances when subsequent suits were not barred - Where a previous suit for a declaration of title to immovable property has been dismissed on the ground that the plaintiff at the time of the institution of the declaratory suit was in a position to sue for the possession of the property, a subsequent suit on the same title for recovery of possession of the land is not barred by Or. 2 r. 2 CPC, AIR 1925 Cal 819, 11 CLR 183, ILR 34 All 172.

The suit for declaration of title simpliciter without proving amicable partition be dismissed. But such dismiss will not debar the plaintiff from filing a separate suit for declaration of title and partition, 3 MLR (AD) 15 = 3 BLC (AD) 175 =18 BLD (AD) 95, AIR 2004 SC 1761. Whether the decree in a previous suit for declaration of title which was found hit by sec. 42 of S.R. Act would operate as resjudicata in a subsequent suit for title and possession. The question was categorically answered in the negative, AIR 1929 Lah 596.

The former suit was a suit for permanent injunction, whereas the subsequent suit is for title and possession. The question of possession was decided against the plaintiff whereupon his suit was dismissed. But this finding as to possession in the suit for injunction cannot operate as resjudicita in the subsequent suit for declaration and possession, 31 DLR 84. Plaintiff filed the suit for declaration of title. Held: Admittedly plaintiff's purchase is through a co-sharer. He cannot claim declaration of title simpliciter unless he claims a partition for determining the respective shares of the 4 brothers. Though the suit is dismissed here, plaintiff is free to agitate the question of his title and entitlement to specific portion in a properly framed partition suit, 18 DLR (AD) 95.

Former suit for injunction was dismissed on technical ground, the subsequent suit for declaration of title and recovery of possession is not barred by *res judicata*, because the question of status of plaintiff as lessee was not decided in earlier suit. The subsequent suit is also not barred by r. 2(3) of Or. 2 since the causes of action are different, AIR 1993 SC 1756.When an issue was not raised in a previous suit because of the 'form' of the suit, judgment of that suit would not operate as resjudicata in a subsequent suit embracing this issue, AIR 1935 Cal 642.Previous suit was dismissed on the findings that the suit lands were unspecified; the present suit for the self-same reliefs of declaration of title etc. by same plaintiff is not barred by res judicata, 21 BLC 433.

5. Explanation V; Any relief claimed in plaint if not expressly granted by decree, it shall be deemed to be refused:

Expl. V speaks that if a relief is claimed in a suit, but is not expressly granted in the decree, it shall be deemed to have been refused and the matter in respect of which the relief is claimed and refused will be res judicata. 42 DLR (AD) 294, AIR 1998 P&H 202, AIR 1957 AP 981, 7 BLC (AD) 114. It is clear that sale deed dated 9.11.89 was challenged in earlier writ petition but no rule was issued and as such relief by the writ petitioner in respect of the

said sale deed in that writ petition was not granted at the initial stage of issuing the rule and as such the relief against the said sale deed shall be deemed to have been refused for the purpose of Explanation V to sec. 11 of the Code. So he cannot seek relief against the said sale deed by filing another writ petition, 4 ADC 339. If the decree does not award future interest, it must be taken to have been refused, AIR 1963 Cal 416.

Contrary situations – The suit was for declaration of a mortgage liable to be redeemed and for possession; the suit was decreed but in the decree nothing was said about possession. Held: Relief granted by judgment but omitted from decree cannot be said to have been refused and therefore Explanation V to sec. 11 of CPC is not applicable and the plea of res judicata cannot lie, 15 DLR (SC) 172. It is incumbent to refer to the judgment itself for construing a decree. The decree though silent as to interest from the date of the suit, the trial court ordered that plaintiff is entitled to get decree as prayed for. He prayed for interest from the date of suit and that concludes the matter, 10 BLD (AD) 74.

6. Explanation VI; Decree in suit respecting public right or of common private right:

Decree in representative suits operate as resjudicata; exp. VI: Explanation VI to s. 11 CPC is also a clarification on this point. Accordingly, if the defendants are sued in their representative character, the decision binds all who have the same interest.

Judicial pronouncements – The explanation VI provides that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of s. 11, be deemed to claim under the provisions so litigating. AIR 1964 SC 107, AIR 2003 SC 3349. A suit u/s. 92 of CPC is a representative suit and the decision in such a suit binds not only the parties to it but also those who share common interest and are interested in the trust. Entire body of interested persons is barred by Constructive *res judicata*, AIR 1990 SC 444, AIR 1939 All 586.

A *bonafide* compromise in a proper representative suit is binding on the persons represented. AIR 1951 Cal 456.In view of Expl. VI it cannot be disputed that sec. 11 applies to public interest litigation as well, but it must be proved that the previous litigation was the PIL, not by way of a private grievance. It has to be a bona fide litigation in respect of a right which is commons and is agitated in common with others, AIR 1986 SC 391. Not necessary that the pleadings should state that person is suing or being sued as a manager; it is sufficient if the person is suing or being sued is in capacity as a manager, AIR 1970 SC 5.

Contrary situations – If notice u/o. 1 r. 8 was not given, the decree passed will bind only those parties who were brought on record. AIR 1933 PC 183, 54 DLR 364.Where a representative suit is abandoned by plaintiff and is dismissed, it cannot operate as res judicata to bar a fresh suit re-agitating the matter. If the suit ceases to be a representative suit or if the litigation is not bona fide it cannot have the force of res judicata. AIR 1928 PC 16, AIR 1937 PC 1. A suit filed without complying provisions of r. 8 of Or. 1 will not bind the persons represented in the suit, though it will bind the persons who have been joined as parties. AIR 1983 Ori 50, AIR 1987 Mad 187, AIR 1977 All 421.

Decree upon a shebaiyet/mutwalli/manager of religious or trust property is binding upon next shebaiyet/mutwall and operate as res judicata:

The respondent herein as plaintiff filed T.S. no. 405/84 for specific performance of contract against one Giribala, alleged Sebayet of suit land's temple and obtained exparte decree and obtained delivery of possession by execution of decree. Then the petitioner herein filed T.S. no. 167/91 for setting aside the said decree. Held: This plaintiff has no locus *standi* to file the suit alleging him to be a shebait long after the delivery of possession of suit land to the respondent. 16 BLT (AD) 231.

Contrary situations – Where in a previous suit a party of a subsequent suit was impleaded in his representative capacity as an heir of the original tenant and it was not open to him to raise any defence in his personal capacity he can subsequently raise objection and his hereditary nature in the previous suit does not operate as res-judicata. 43 DLR 601.

7. Explanation VII; Application of provisions of s. 11 to execution proceedings: Provisions of s. 11 are applicable to execution proceedings too.

See below under heading Res judicata in execution proceedings.

8. Explanation VIII; Decision of court of limited jurisdiction, i.e. special courts/Tribunals, operates as res judicata upon civil suits:

The expression "the court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. An issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, AIR 1994 SC 152. The Explanation VIII applies to all the suits pending on the date of its enforcement, AIR 2000 SC 3335. For, the essential requirement of a bar by *res judicata* is that a matter should have been directly and substantially in issue in a prior litigation, and it should have been heard and finally decided by a Court of competent jurisdiction. Of course, Expl. VIII to s. 11 justifies a contention that even if the Court that heard and finally decided an issue between the parties was one of limited jurisdiction, its adjudication would operate as *res judicata*, AIR 2006 SC 2965, (2000) 8 SCC 99. Even outside civil court, the principle applies to other courts and tribunals like labour courts, AIR 1969 Mad 406.

Whether decision in writ jurisdiction operates as resjudicata upon civil suits too: If an issue was finally decided on merit in an earlier suit or even in a writ petition by the HCD, the same issue shall operate as *resjudicata* in view of the provision of sec. 11 of the Code, in a subsequently filed suit on the same issue, 54 DLR 310, 17 BLT (AD) 92, AIR 1971 SC 1676, AIR 1968 SC 1370. The observations made in the judgments of the writ petition are of the nature of guidance. Such observations cannot form the basis of decree in any subsequently instituted suit. When the case of promotion is duly considered there is the sufficient compliance with the observation of the judgment. The term consideration does not necessarily mean that the incumbent must be given promotion, 3 MLR (AD) 18, 3 MLR (AD) 71, AIR 1991 SC 264.

Contrary situations; where does not form resjudicata - Observations of the HCD while exercising writ jurisdiction on title and possession of property will not be taken into account as a finding of fact or law in any litigation in civil court, 4 MLR (AD) 417, 52 DLR (AD) 43 = 19 BLD (AD) 300, 15 BLC (AD) 115. In writ petition no. 262/85 issues have been raised in the present writ petition were not adjudicated in any respect directly or indirectly and as such the question of constructive *resjudicata* has got no merit, 7 BLC (AD) 144. It cannot be said that matter of notice relating to the latter dated 14.3.59 was directly and substantially in issue in the Writ Petition. Therefore it cannot be said that the suit itself is barred, 20 DLR 732. The principle of res judicata was not applied where the first writ petition was filed on the ground of apprehended bias and was dismissed as withdrawn and the second petition was filed on the allegation of actual bias. The subject-matter was also different. AIR 2002 SC 790.

But, where the issue in subsequent civil suit is different, it does not operate as resjudicata -Decree or proceeding in Artha Rin Adalat does not operate as res judicata or sub-judice u/s. 11 or s. 10 of CPC for suits in civil court for reliefs which are not within the ambit of the Adalat. 12 BLT 517 = 56 DLR 588.The Bank filed T.S.

No. 147/92 in Artha Rin Adalat claiming mortgage of the properties of one 'A'. The suit was decreed. Then 'A' being plaintiff filed T.S. No. 208/97 against bank for a declaration that the plaintiff had no liability to the petitioner bank for any loan amount, the so-called Memorandum of deposit of title deed dated 17.3.88 was forged, concocted and illegal. Held: When no specific issue was framed and decided in the previous suit between the same parties, nor the subject-matter of the subsequent suit was the same, the subsequent suit is not barred by the principle of res-judicata, 10 MLR (AD) 4.Plaintiff filed the suit no. 197/01 in the civil Court for declaration that plaintiff had no liability to the defendant-Bank for loan amount, the so-called Memorandum of Deposit of deed dt. 17.3.88 was forged. Defendant alleged that the Bank has already obtained a decree in Artharin suit no. 147/92 from Adalat wherein it was found that plaintiff's said property was mortgaged to the defendant bank as such the suit was hit by resjudicata. Held: Earlier suit was for a money decree in respect of loan, but this suit is for declaration that plaintiff's property was not subject-matter of security in respect of said loan. No issue was framed regarding subject-matter of present suit and decision was arrived at and the issue of present suit was not directly or substantially an issue in the previous suit so as to render the present suit barred by principle of resjudicata, 57 DLR (AD) 51 = 13 BLT (AD) 116, 24 BCR (AD) 330.

Generally findings in pre-emption case do not operate as res judicata in civil suits: Suit was for declaration that the deed dt. 24.3.88 is forged and inoperative. Held: The question of resjudicata does not arise in the instance case as to constitute resjudicata it has to be shown that any issue of the pre-emption case was an issue in the instant case, 5 ADC 237. The issue of co-sharership in the tenancy settled in pre-emption proceeding is not barred by the principle of *resjudicata*, 7 ADC 568. Question relating to title are outside the scope of a case u/s. 88 of Bengal Tenancy Act. Sec. 88 of the Act contemplates a case relating to division of a holding or

distribution of its rent. So, the decision in a case u/s. 88 of the Act cannot operate as *res-judicata* in a subsequent suit for partition between the parties, 18 DLR 538.

Contrary situations; where may operate as resjudicata – In a proceedings u/s. 26F of B.T. Act it is open to the court to go into the question of the nature of tenancy, and if such question is gone into, the decision will operate as *resjudicata* in a subsequent suit. 9 DLR 309.

Different categories of decrees, which may or may not operate as res judicata:

(i) Whether compromise or consented operates as res judicata:

See u/o. 23 r. 3 under heading of Compromise or consented decree operates as res judicata, and even if may not, yet operates as estoppel.

(ii) Whether exparte decree operates as resjudicata:

Even exparte decree, until and unless set aside, operates as resjudicata – An ex parte decision, if not set aside or appealed from, shall operate as res judicata, 13 DLR (SC) 105, 19 BLT (AD) 119, AIR 1950 PC 17, AIR 1989 SC 2240. So long the exparte decree is not set aside the same being remaining the legal one and the decree has been passed by a competent court, the subsequent suit is certainly barred by the principle of res judicata, 25 BCR (AD) 164, 11 MLR (AD) 132.

In the former suit the issue regarding acquisition of customary right of pasturage over the suit land by the plaintiff's was raised and finally decided though the suit was decreed exparte – Held: The decree even if exparte will operate as resjudicata – In the absence of fraud the exparte decree is binding, 7 BLD 307, AIR 1947 All 147. Where a decree has been obtained by a fraud practice by which the fraud-donee was prevented from placing his case, the decree is not binding upon him and that decree may be set aside by a court of Justice in a separate suit and not only by an application u/o. 9 r. 13, ILR 21 Cal 612. But this principle was no longer continues. Principle has been settled that where a case has been decided, even exparte, the decree cannot be

set aside merely upon the ground that the claim of the plaintiff in that case was false or that it was obtained by the aid of perjured evidence and that something more should be proved in support of the allegation of fraud, AIR 1927 Cal 84, AIR 1940 Cal 489 44 CWN 849.

Contrary situations – It is now well settled principle of law that an exparte decree can be set aside by a new action when the court passing it had been misled by fraud, and that an exparte decree can be set aside in a later action when the same was obtained by suppression of summons, 4 DLR 636, 4 DLR 487, 11 DLR 376, 42 DLR 154 = 10 BLD 139. Suit was for declaration that the exparte decree passed in O.C. Suit no. 173/96 is illegal and not acted upon on averments that in that though he appeared the said suit but due to various unavoidable reasons he could not continue to contest the same and as such the impugned decree was passed. Held: From reading of the plaint it cannot be decided that the suit is fruitless and as such the application for rejection of plaint is of no merit, 20 BLD 227.

(iii) Decree in suit for perpetual injunction usually does not operate as resjudicata in subsequent partition suit or suit for declaration of title and possession, etc.: In a suit for permanent injunction and in a suit for partition the reliefs sought for are quite different and distinct from each other and the result of the suit in the permanent injunction shall not operate as *resjudicata* in a suit for partition wherein the question of title of the respective parties and their shares are to be ascertained and declared, 15 BLD 325. Plaintiffs being in exclusive possession of the suit land are entitled to the relief prayed for a decree of permanent injunction. But such a decree shall not be treated as ouster of the defendants as co-sharers from the suit land for the purpose of a suit for partition, 44 DLR 419, 5 DLR 39, 11 CWN 517, AIR 1924 Cal. 792, 42 DLR 408 = 9 BLD 368, 12 DLR 708, 11 DLR (SC) 78. Suit was filed seeking eviction of the licensee/permissive possessor and for khas possession of the suit land. The trial court and the appellate court held that the suit was barred u/ss. 10 & 11 of the Code because of

the pendency of O.C. suit no. 83/67 which was filed by the defendants seeking for a decree of permanent injunction and still pending. Held: Trial court and appellate court were unmindful of the fact that in a suit for permanent injunction title of the parties is not adjudicated; since the issues involved in the suits are not same, the subsequent suit cannot be barred, 4 ADC 37.

The dismissal of a suit for an injunction in respect of certain property on the ground that the plaintiff has not proved his possession in suit land, is no bar to a subsequent suit for possession of the same property, AIR 34 All 172. The former suit was a suit for permanent injunction, whereas the subsequent suit is for title and possession. The question of possession was decided against the plaintiff whereupon his suit was dismissed. But this finding as to possession in the suit for injunction cannot operate as *resjudicita* in the subsequent suit for declaration and possession, 31 DLR 84, 5 BLD (AD) 275, 24 BLC 592, AIR 1929 Lah 596, 2010 SC 3835.

Former suit, T.S. no. 59/99 for permanent injunction which was dismissed on contest; the present suit filed by the self-same plaintiff for declaration of title, confirmation of possession and permanent injunction. So, it cannot be said that the issues decided in the former suit are same in the present suit. 21 BLC 378.

The fact that plaintiff earlier had filed suit for bare injunction and failed to prove possession in the suit land, so the suit was dismissed. Held: It does not mean that he would be precluded from proving his possession and title to the suit land. AIR 2005 Kant 70. Suit was for permanent injunction. Defendants claimed that they are also joint owners in the suit property by inheritance. Held: Since this is not a suit for declaration of title, the defendants have ample scope to establish their title in the suit property by a properly constituted suit for title if so advised and in that case this decree injunction will not be a bar for both the parties. 21 BLC 636. Suit was for permanent injunction. Plaintiffs claimed the suit lands to have got by purchase vide several successive sale deeds. The defendants claimed to have got the

same lands vide other sale deeds from other co-sharers. It was found that the suit lands were recorded in the names of plaintiffs in separate khatian in separate plot. The suit was decreed holding that this decree shall not be binding in the trial court if any suit is filed for partition by these defendants. 8 ALR (AD) 147.

Suit was filed for cancellation of sale-deed. The earlier suit was for injunction. Held: Relief of cancellation of sale-deed was not sought in the earlier suit, therefore, the cause of action in both the suits were different and so the suit for cancellation of sale-deed was not barred by Or. 2 r. 2 CPC, AIR 2013 Uttr 91. The T.S. no. 270/81 was filed challenging the order of Govt. treating the suit property as vested property, i.e. for declaration of title in suit property and for further declaration that proceedings of V.P. App. no. 45/80 are illegal and also for permanent injunction. The present T.S. no. 65/93 is a suit for partition simpliciter. From reading of the plaint of the two suits it appears that the suit properties and the parties are not the same and the issues involved therein are different. The causes of actions of the two suits are also distinct. The plea of bar to the suit under the provision of Or. 9 r. 9 CPC appears to be totally misconceived, 17 BLD 229 = 5 BLT 36.

Contrary situations; when operates as resjudicata – Unless the decree for permanent injunction is set aside, no suit for declaration of title is maintainable u/s. 42 of S.R. Act, 2 ADC 233, 9 ADC 678. The decree of permanent injunction is still alive, the present plaintiff has no legal right and scope to file the present suit praying for decree of recovery of khas possession, 32 BLD 309 para 18, *N.B. It should be perincuriam, because it is contrary to principle of permanent injunction.*

See more above u/expl. IV under heading of constructive res judicata.

(iv) If former suit was dismissed only for want of further/ consequential relief, subsequent suit with said further/ consequential relief though not barred by resjudicata, but may be barred by constructive resjudicata either u/exp. IV of s. 11 or u/s. 12 read with or. 2 r. 2:

See below u/exp. IV, u/s. 12 & u/Or. 2 r. 2, etc.

(v) Only decrees of courts of civil judicature operate as res judicata; administrative orders or decisions of any other authority has no force of resjudicata:

A decision which is a judicial order of the court may operate as resjudicata; mere administrative order of a Court does not operate as res judicata -Appointment of a pleader Commissioner to give delivery of possession of saham lands in terms of preliminary decree is an administrative order, 13 DLR 571. The criminal Court's finding of possession is not admissible in evidence in a civil suit, 11 DLR 470, 40 DLR 271. Decision on a question of assessibility to income-tax by an officer of the Income-tax Department on a previous occasion does not governed by the principles of *resjudicata* when the same question comes up for consideration on a subsequent occasion, 17 DLR (SC) 469.

A decision given by a certificate officer in course of the proceeding before him will not operate as res judicata in a subsequent civil suit. 6 DLR 177. A decision of the Revenue-officer u/s. 106 of B.T. Act has been given force and effect of a decree of a Civil Court by sec. 107 of that Act. But in order to decide to what extent such a decision bears the jurisdiction of the Civil Court, sec. 107 must be read with the proviso to sec. 109. If an application u/s. 106 is withdrawn or dismissed for default or if any matter rose in that application but has not been finally adjudicated upon, the jurisdiction of the civil court is not ousted. Clause (b) of the proviso makes it clear that if two matters are raised in a suit u/s. 106 of which one is finally decided and the other is not, the jurisdiction of the Civil Court is not ousted in respect of the matter not decided. That being the position, a matter which has been not only decided but not at all raised, cannot be *resjudicata* constructive so as to deprive the Civil Court of its jurisdiction, 5 DLR 515.

A decision by Revenue Court will not operate as res judicata in a subsequent suit unless by any statute the Revenue Court has been given the exclusive jurisdiction to decide the issue. 5 DLR (FC) 4, 5 DLR Dec. 294, AIR 1987 SC 2205. The jurisdiction

of a Revenue Officer u/s. 106 of B.T. Act is conferred to a decision on the point whether the entry in the record of rights is correct or not. If he holds that the entry is correct that does not bar the plaintiffs from bringing a suit in Civil Court to have their title declared and possession confirmed. Therefore, the decision u/s. 106 of B.T. Act does not operate as *resjudicata* in a subsequent suit in civil court between the parties, when the parties are tenants, 19 DLR 193, 24 CLJ 79, 18 CWN 79, 29 CWN 755, 34 CWN 47.

Contrary situations –However, the decision of Revenue Officer u/s. 106 of B.T. Act in dispute between a landlord and tenants operates as *resjudicata* between the same parties in a subsequent suit in the civil case, 2 CWN 421, 33 CWN 693.

(vi) Decision of court of limited jurisdiction, i.e. special courts/ tribunals, does not operate as res judicata upon suits of civil court:

See u/explanation VIII under same heading.

(vii) However, decisions of the civil courts are binding upon the special courts/Tribunals:

The petitioner filed T.S. no. 659/83 for declaration that the disputed property was not an abandoned and he has title and interest thereto; the said suit was dismissed on contest. Then he filed another case no. 318/88 of the 1st Settlement Court, Dhaka with prayer for exclusion of the disputed house from "ka" list of the Abandoned Building. Held: The decision of civil courts is not only binding upon the present petitioner but also upon the Court of Settlement. The Court of Settlement acted without any lawful authority in declaring the house in question as not an abandoned property, 16 BLD (AD) 165, 4 MLR (AD) 353, 15 BLC 232.

Some further characteristics and effects of resjudicata –

(i) Provisions of sec. 11 are mandatory: Principle of *res judicata* is mandatory provision of law. Once the conditions are fulfilled resjudicata will apply and will bind the party. 10 DLR 621, 45 DLR

405, 20 BLD 347= 6 BLC 163 = 8 BLT 136, 64 DLR (AD) 107, 13 BLD (AD) 217, AIR 1937 PC 1. The provisions of sec. 11 are mandatory and a litigant can avoid the provisions by taking advantage of sec. 44 of Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion, 60 DLR 325.

(ii) Resjudicata cannot be avoided on the plea of wrong decision:

The court is not concerned with the correctness of the decision of the earlier judgment; even an incorrect judgment operates as res judicata. AIR 1988 SC 1531. The Principle of resjudicata cannot be avoided on the ground that the previous decision was wrong; the correctness or otherwise of the previous decision has no bearing on the question whether it operates as resjudicata. AIR 1960 SC 1186, AIR 1997 SC 808, 45 DLR 347.

A decision on question of law is res judicata even though the ruling on the basis of which the decision was given has been overruled. 16 DLR 92, AIR 1994 Guj 75. A previous decision on a matter in issue is a composite decision; the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as *resjudicata* in a subsequent proceeding between the same parties if the cause of action of the subsequent proceeding be the same as in the previous proceeding but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the court to try earlier proceeding nor when the earlier decision declares valid a transaction which is prohibited, (1970) 1 SCC 613, 32 DLR 196. A party to the suit cannot say that an agreement, which was the basis of the suit, was forged, 45 DLR 5.

(iii) Contrary situations – where wrong/erroneous decision/decree does not operates as resjudicata– Decree granting declaration of title ignoring registered sale deed of disputed property in favour of defendants illegal. AIR 1998 Kant 321. The question, however, arises as to whether an error of law committed by judicial or quasi-

judicial authority in a previous proceeding operates as resjudicata in a subsequent proceeding. Held: If the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as res judicata between the parties in a subsequent suit or proceeding, if the cause of action is the same. But a question on an abstract question of law unrelated to facts which give rise to a right cannot operate as res judicata. AIR 1990 SC 334, AIR 1971 SC 2355, AIR 1990 Ker 88.Where the previous judgment is based on erroneous decision without giving effect to statutory prohibition then the said decision will not operate as res judicata, AIR 2017 SC 3395.

Where the decree is opposed to law on public policy, the rule of res judicata cannot operate. AIR 1960 Mad 377. The Amalnama and Dakhilas filed by the plaintiffs were not filed in their earlier suit wherein they got the exparte decree upon which they are claiming in the instant suit. Therefore it creates doubt upon genuineness of those papers. Thus I hold that the said exparte decree got no leg to stand upon, 16 MLR 130 para 17.

The suit land was acquired in L.A. Case no. 2 of 87-88 for RAJUK. Since RAJUK has got direct interest in the suit land it was quite competent to bring it to the notice of the Court that a decree which is a nullity was passed against it. In such a case of special nature, delay and procedural defect shall not stand in the way of getting the desired relief, 2 LNJ (AD) 33 = 18 BLC (AD) 1 = 6 XP (AD) 119.

From the averments in the plaint it is seen that plaintiff has not filed the suit for setting aside the decree merely on the ground of suppression and non-service of summons but also on the grounds that the averments upon which the defendants had acquired decree in the previous suit were untrue. This question of falsity of claim was not an issue in earlier misc. case u/o. 9 r. 13. So, question of *resjudicata* does not arise, 52 DLR 93, AIR 1957 (Cal) 242, 42 DLR 154 = 10 BLD 139.

It appears that a vast tract of land within the reserved forest has been claimed by the plaintiff of that suit being no. 160/66 on the basis of pattan from ex-landlord in the year 1946. But in that

suit he could not produce any supporting evidence of title as claimed. Moreover, in view of the statement made in the plaint that the suit land has been recorded as forest land. Therefore, the trial court committed error of law in passing the impugned exparte decree mechanically, without considering the effect of provisions {of sec. 20(2)(a)(iii)} of SAT Act and it is also proved that the same was a product of fraud and collusion of plaintiff and clerk of Govt. pleader. As such for doing complete justice the appeal should be allowed and the decree in question be set aside for having a proper adjudication in the matter of the real dispute. 19 BLD (AD) 153 = 9 BLT (AD) 242.

(iv) However; in case of fraud, resjudicata does not operates: *Though a decree operates as res judicata, but if the decree was obtained by fraud, doctrine of resjudicata does not arise; such as* – The provisions of sec. 11 are mandatory and a litigant can avoid the provisions by taking advantage of sec. 44 of Evidence Act, which defines with precision the grounds of such avoidance of a decree, i.e. on fraud or collusion, 60 DLR 325, AIR 1950 All 488, 50 DLR (AD) 205. Where a plea is raised that the decree passed in earlier proceedings was collusive, it would not operate as res judicata, AIR 2000 SC 3272. If a party obtains a decree from the court by practicing fraud or collusion, he cannot be allowed to say that the matter is resjudicata and cannot be reopened. AIR 1995 SC 1205, AIR 1997 SC 1333. It is now well settled principle of law that an exparte decree can be set aside by a new action when the court passing it had been misled by fraud, and that an exparte decree can be set aside in a later action when the same was obtained by suppression of summons, 4 DLR 636, 4 DLR 487, 11 DLR 376, AIR 1927 Cal 84, AIR 1940 Cal 489 44 CWN 849, 42 DLR 154, 31 DLR (AD) 51, AIR 2015 SC 1921, AIR 2016 SC 2865.

When a judgment is given in evidence, the party against whom it is given in evidence may, in the proceeding in which it is given in evidence, show that the judgment was obtained by fraud or collusion, and a separate suit to have the said judgment set aside is not necessary. In view of the wide term of sec. 44 of the

Evidence Act, it cannot be said that it is not open to a court other than the court from which the decree was passed, in cases fraud or collusion, to deal with the matter and decide whether the decree was obtained by fraud or collusion, 16 MLR (AD) 97 = 4 XP (AD) 82. A judgment-debtor can maintain a suit for declaration that the assignment of the decree against him by the decree-holder is invalid as being fraudulent, 117 IC 893, AIR 1926 Lah 51.

Contrary situations; where suits for setting aside decree barred by resjudicata–Suit was for declaration that exparte decree passed in Mortgage suit no. 32/74 is illegal and fraudulent alleging that plaintiffs were purchasers of the suit property from defendant of said suit vide 3 sale deeds in 1977. Held: Admittedly the plaintiffs purchased the suit property during pendency of the suit, the impugned decree is binding on them; as such they cannot challenge the said decree, 11 BLD 489. Plaintiff's property was wrongly sold in execution it was held that the suit for declaration of title and delivery of possession with regard to the land wrongly sold in execution was barred u/s. 47 CPC, AIR 1957 Pat 700.

N.B. For wide appreciations see in this writer's book on Specific Relief Act u/s. 39.

(v) Partial resjudicata, also may occur:

A previous decision by a competent court regarding part of the claim in a subsequent suit excludes that part as res judicata, even though the subsequent suit as a whole cannot be tried by the court deciding the former suit. 8 DLR 604.The principle of res judicata is attracted even if it may be that in the previous suit only part of property was involved whereas in the subsequent suit the whole property is involved, AIR 2003 SC 4295. Even in case of final determination regarding suit lands, subsequent suit so far relates to subject-matter of earlier suit, may be partial, should not be allowed to proceed with for preventing abuse of the process of the court, 9 MLR (AD) 294 = 1 ADC 210, 24 BCR (AD) 108, 12 BLD (AD) 247.

(vi) In case of two conflicting/contradictory decrees on same subject matter, latter will be effective: If two or more conflicting

decrees happened to be passed between the same parties regarding the same subject-matter in two different proceedings, it will be the last one which will prevail, 10 DLR 621. It is settled that an earlier decision which is binding between the parties loses its binding force if between the parties a second decision decides to the contrary. Them, in the third litigation, the decision in the second one will prevail and not the decision in the first, AIR 2000 SC 1238.

Contrary situations; instances whena decree does not operate as resjudicata:

(i) A decree can be avoided from res judicata if it was obtained by fraud or collusion; sec. 44 of Evidence Act:

See above under similar heading.

(ii) When the former suit was dismissed for default or was withdrawn: Where the previous suit failed on a preliminary point, a finding as to other point in that suit on merits would not bar the defendant from relying on the same defence once again, ILR 13 Cal 17, 12 IA 23, 6 DLR 1. When the former suit was dismissed for default especially when the former suit was suit for partition, principle of *res judicata* does not apply to a subsequent partition suit where the plaintiff was not allowed saham in the previous suit, 61 DLR 429, 15 MLR 382; when the former suit was withdrawn; when the plaint of former suit was rejected, the principle of res judicata has no concern. Plaint of subsequent suit cannot be rejected on the ground of res judicata, when the previous suit was dismissed for default, 14 MLR 170.

The cause of action for a partition suit being recurring one the dismissal of a partition suit for default does not bar again a suit for partition, 2 BLT 139, 28 BLD 457, 29 BLD 271, AIR 1953 Mad 458.

A miscellaneous case filed u/o. 21 r. 38 was dismissed for default; then the petitioner filed another petition. Held: The maintainability of the second application u/o. 21 r. 38 CPC was challenged on the ground that it was barred by res judicata, an earlier application having been dismissed by the Artha Rin Adalat.

The HCD rightly held that the principle of res judicata is not applicable in such a proceeding. 4 BLT (AD) 155.When a former partition suit was dismissed for default, principle of *res judicata* does not apply to a subsequent partition suit where the plaintiff was not allowed saham in the previous suit, 61 DLR 429, 15 MLR 382, 14 MLR 170, 2 BLT (AD) 139, AIR 1953 Mad 458, AIR 1959 Punj 252, 17 BLT 1, 2 XP 189.

An order permitting the withdrawal of the leave petition cannot operate as *resjudicata* against subsequent petition u/art. 226 of the Constitution. AIR 1981 SC 960. The present suit was only for permanent injunction against holding examination. This will not affect any suit of the petitioner on any other claim or cause of action if that claim is otherwise not barred by law. In that view of the matter this application for withdrawal of the suit with permission to sue afresh is misconceived and need not be considered at this stage. 5 BLD 128. The suit for permanent injunction was withdrawn by plaintiff without permission to sue afresh. Thereafter, said plaintiff filed another suit for permanent injunction impleading the same defendants. Held: When the possession of a co-sharer is disturbed by other co-sharers, it furnishes a successive cause of action and injunction suit could not be dismissed on the mere ground that earlier suit was withdrawn by the party. Every threat to rights of a co-sharer will furnish a fresh cause of action and as such, it cannot be held that the present suit is barred u/o. 23 r. 4 or u/s. 11 of CPC. 2000(4) CLJ 155.

The first suit for partition of joint properties had been withdrawn with the consent of the defendant but without the leave of the Court for bringing a fresh suit. On being subsequently dispossessed from joint properties after such withdrawal a fresh suit was filed and it was held that the mere fact that the subsequent suit related to the same property was not sufficient to make it one for same subject-matter and hence the second suit was not barred u/s. 373 of the Code, 1881 (similar to Or. 23 r.1 of present CPC), 4 CWN 110.

Contrary situations – In a suit for injunction and damages specific plea of title of plaintiff was raised and suit was dismissed. Subsequent suit for recovery of possession is barred by res judicata. 1996 AIHC 1288 (Ker).

More see u/o. 9 r. 9, u/o. 23 rr. 1&2.

(iii) When the former suit was disposed on preliminary issue:

If the former was dismissed on any technical ground, e.g. for want of jurisdiction, or for default of the plaintiff's appearance, or on the ground of non-joinder of parties, or on the ground that the suit was not properly framed, etc. there is no decision on merits and as such it cannot operates as res judicata in subsequent suit. AIR 1969 SC 971, AIR 1989 SC 2240, AIR 1935 Cal 160, AIR 1924 All 905, AIR 1996 SC 2367, AIR 1927 Cal 794.

It appears that the legality of either the Martial Law Proclamations or that of the Fifth Amendment was not finally decided in the Order summarily rejecting the writ petition no. 802 of 1994. Such summary rejection does not debar challenging of those provisions in a subsequently filed writ petition, on the principle of resjudicata, since no such issue had been raised therein or heard and finally decided by the said Court, 62 DLR 70, AIR 1970 SC 1455.The previous pre-emption case was rejected on preliminary point of maintainability, i.e. immaturity of the case, and no decision on other issues relating to status of co-sharer of the pre-emptor was given; it does not operate as *resjudicata* in subsequent pre-emption case on the self-same cause of action,11 BLD 256 = 43 DLR 644. Where the previous application was rejected for being infructuous and was not decided on merits, the principle of resjudicata would not operate, AIR 2009 SC 664. Where the former appeal was for non-substitution within time, the doctrine of res judicata will not apply, if the court feels so, AIR 2004 SC 4158.

More see under heading Issue of former suit was finally decided/adjudicated.

(iv) In case of different cause of action:

If earlier suit was based on lease and the subsequent suit is based on title, then res judicata will not apply, AIR 2000 SC 212. The decision in a suit for injunction is not binding on a latter suit or proceeding on question of title, where title is directly in question, even though issue on title was framed in that suit and incidental finding on question of title was given, AIR 2000 SC 3172. The findings given on an application for grant of succession certificate are not final and do not operate as res judicata, AIR 2000 SC 3279. The finding in an earlier occupation of the premises will not operate as res judicata in a subsequent eviction proceeding after the issue of notice of termination of the lease, AIR 1997 SC 697.

See more under different headings.

(v) "Decision of a court without jurisdiction does not operate as res judicata": An order passed without jurisdiction is nullity. It would not attract principle of res judicata, AIR 2004 SC 2186, AIR 2009 SC 1647. The principle of *res judicata* belongs to the domain of procedure it is not attracted when decision involves question of jurisdiction, AIR 2005 SC 1050, AIR 2004 SC 2836, AIR 2005 SC 3708. The tribunal issued purchased certificate, which is within jurisdiction of civil court; it was without jurisdiction and hence nullity; no question of res judicata arises in such a case, AIR 1998 SC 1808, AIR 1998 SC 972. A question relating to the jurisdiction of the court cannot be deemed to have been finally determined by an erroneous decision of the court. Such a decision cannot operate as res judicata in subsequent proceedings, AIR 1971 SC 2355.

See more under another heading.

(vi) If suit for specific performance of contract be dismissed then second suit for refund of the advance money is not barred: If a suit for specific performance of a contract is dismissed, second suit for compensation for the breach of such contract is barred u/s. 29 of SR Act, but no law prohibits him to sue for refund of his advance money.

Judicial decisions may be referred– The term 'compensation' does not include "earnest money" or "deposit". Consequently, a vendee may, in spite of dismissal of his suit for specific performance, bring a separate suit for recovery of earnest money or deposit. 17 CWN 100, AIR 1929 Lah 332, AIR 1923 All 321.

Dismissal of suit for specific performance of agreement to sell is no bar to subsequent suit for recovery of earnest money paid in pursuance of agreement. Limitation for the second suit would start running only from the date of final decision of earlier suit and bar of Or. 2 r. 2 of CPC, would not be applicable. 2002 YLR 3192. The bar to a subsequent suit contemplated u/s. 24 (s. 29 in Bangladesh) is in respect of claim for compensation alone. The claim for refund of consideration money is not barred. AIR 1923 All 321, AIR 1945 Nag 67, ILR 31 All 68, AIR 1923 All 321.

(vii) Subsequent suit for damages due to false or vexatious suit or defence is not barred:

See discussion u/s. 35A(3).

(viii) When an application u/o. 9 r. 13 setting aside a decree had already been rejected, then another suit for declaration of decree to be void or setting aside the decree is not barred by resjudicata: It may be mentioned that if the plaintiff can prove that he has good title and all along possession in the suit lands, he can maintain a fresh suit for challenging the decree even after he has failed in a case u/o. 9 r. 13.

Judicial pronouncements– A suit by a defendant who previously was unsuccessful in the proceeding u/o. 9 r. 13 for setting aside the exparte decree is maintainable if the same is filed attacking the claim of the suit in which *exparte* decree was obtained falsely and challenge the suit as a false suit, AIR 1957 (Cal) 242, 15 BLD 519.Dismissal of an application filed u/o. 9 r. 13 CPC cannot operate as a bar in instituting a fresh suit for setting aside the *exparte* decree, 18 MLR 49 = 33 BLD 62, 4 BLD 223, 29 DLR (SC) 283.

When an exparte decree is challenged in a separate suit on ground of being obtained by fraud, and some elements of fraud and collusion are found on the record, the court is not to sustain such fraudulent decree even if an application u/o. 9 r. 13 CPC seeking the setting aside of the exparte decree is barred by limitation, 50 DLR (AD) 205, 4 BLC (AD) 92, 12 DLR 224.

A miscellaneous case u/o. 9 r. 13 was filed alleging suppression and non-service of summons and was unsuccessful. Thereafter, a suit was filed for declaration that plaintiff has title in the suit lands and that the said decree is illegal and is not binding upon plaintiff. Held: Plaintiff has not filed the suit for setting aside the decree merely on the ground of suppression of summons but also on grounds that the defendants had acquired decree in previous suit on untrue averments. In this suit plaintiff is first to prove his title. This question of falsity of claim was not an issue in earlier misc. case. So, question of *resjudicata* does not arise,52 DLR 93.

In the present case one of the defendants has sought relief by way of filing an application u/o. 9 r. 13 CPC, but that itself cannot be a bar in seeking relief against the exparte decree by institution of an independent suit on the ground of fraud by other defendants of the suit, as the reliefs against an exparte decree available under the law are concurrent. 10 BLD 139 = 42 DLR 154.

Contrary situations; when operates as resjudicata –The present plaintiff filed misc. case u/o. 9 r. 13 for setting aside the judgment and decree of T.S. no. 217/92 which was rejected and he did not prefer appeal or revision against it, as such his present suit praying for setting the same judgment and decree is not tenable in law, 32 BLD 309 para 18, 1 BLC 375, 10 MLR (AD) 90.

O.C. suit no. 37/87 was decreed. Two misc. cases were filed against the decree and both were unsuccessful upto Appellate Division. Then another defendant filed another misc. case for setting aside the decree and the same was dismissed as being time barred. Then he again filed suit seeking declaration that decree to be void. Held: The relief so sought is not legally available since the

decree passed in the said suit already reached finality on being challenged by the respondent no. 1 and others. 1 ADC 210 = 9 MLR (AD) 294 = 14 BLT (AD) 179.

(ix) Pure question of law or interpretation of law may not operate as res judicata: Where the decision is on a pure question of law then a Court cannot be precluded from deciding such question of law differently. So far as principle of estoppel is concerned, it operates against the party and not the court and hence nothing comes in the way of competent Court in such a situation to decide a pure question of law differently if it is so warranted. The issues of facts once finally determined will, however, stare at the parties and bind them on account of earlier judgments for any other good reason where equitable principles of estoppel are attracted, AIR 1971 SC 2355, AIR 2016 SC 2231, AIR 2005 SC 3708, (2000) 8 SCC 99.

Interpretation of law in previous case will not operate as res judicata in case there is a fresh cause of action, AIR 2009 (NOC) 2693.

Contrarily – A decision of a tribunal is challenged on a pure question of law depending upon the interpretation of a constitutional provision. On being upheld it would make the decision of the tribunal as having been given by an authority suffering from inherent lack of jurisdiction. The decision cannot be sustained by invoking the doctrine either of *resjudicata* or of estoppel, AIR 1979 SC 193.

(x) In case of change of law: Where there was a change of law by statute, and the causes of action were different the rights must be worked afresh, AIR 1966 SC 1637.

Res judicata in some special types of proceedings –

1. Res judicata in partition suits:

Instances where the principle does not apply in partition suits –

Where in the earlier suit issues centered round declaration of title, recovery of khas possession and confirmation of possession,

subsequent suit for partition is not barred, 1979 BSCR 535. Appeal against final decree of a partition suit without challenging the preliminary decree is defective. However, separate suit for partition and saham of the party having not been granted the saham in previous suit shall not be barred, 12 MLR (AD) 269.

Where a previous partition decree is treated as infructuous and the co-sharers continue to remain in joint possession, a fresh suit for partition is not barred, AIR 1959 Pat 331. Decree for partition can be passed in spite of previous partition if the previous one does not conform to the shares of the parties, 22 CWN 226. The suit for declaration of title simpliciter without proving amicable partition be dismissed. But such dismiss will not debar the plaintiff from filing a separate suit for declaration of title and partition, 3 MLR (AD) 15 = 3 BLC (AD) 175 =18 BLD (AD) 95.Subsequent suit for partition is maintainable when plaintiff of this suit defendant no. 2 in earlier suit and he did not prayed for and was not allotted any saham in the previous suit, 15 MLR 197. Partition of remaining portion of joint property which was not included in the previous partition suit is not barred as the cause of action for partition of joint property is a constantly recurring one, 28 CWN 181 = 32 CWN 103, 17 CWN 521, 13 CWN 309, 6 DLR (FC) 135, 10 DLR 447 para 1, 47 CLJ 436, 1928 Cal 459, 37 CLJ 191, 8 DLR 645.

Contrary situations; where principle of resjudicata operates even in partition suits –The principle of res-judicata is mutual, and it is open as much to a plaintiff as to a defendant to show 'res-judicata' in his favour, and there can be no such bar in law which can prevent the plaintiff from relying upon the plea of res-judicata, even in a partition suit, 8 DLR 159, 9 ADC 345. The declaration of title is barred in view of earlier partition suit between the same parties relating to the same land; also held that when the dispute over the title of the land was decided earlier in a partition suit between the same parties subsequent suit on the same issue is barred, 2 MLR (AD) 218.

Co-owners can thus divide some properties leaving some in joint possession. Where the decree in the previous suit dealt with the properties and directed that some of them should remain joint, a subsequent suit for partition thereof is barred by res-judicata. This happens when the court in effecting the partition holds that a certain

portion of the properties cannot conveniently be partitioned or is in its very nature indivisible and impartible, 32 CWN 1023, 47 CLJ 436, 1928 Cal 459.Parties in a suit for partition should not be driven to a fresh suit only on the ground that substitution of the heirs of one of the deceased plaintiffs or defendants was not sought for well in time, 19 DLR 765, 1 ADC 210 = 9 MLR (AD) 294 = 14 BLT (AD) 179.

In a partition suit each party claiming right under a title which is common to others. If that very issue is litigated in another suit and decided, the others making the same claim can be held to be claiming a right "in common for themselves and others". Each of them can be deemed by reason of explanation VI to sec. 11 to represent all those, the nature of whose claims and interests are common or identical, AIR 1977 SC 1268. In previous suit, the plaintiffs prayed for declaration of title to 90 decimal lands and the said suit was dismissed. Thereafter, they filed another suit for declaration of title to 94 decimal lands of selfsame plot and partition alleging that by suppression of certain facts and committing fraud upon the court the defendants got the earlier suit dismissed. Held: The claim of plaintiffs over the suit lands was rejected even upto Appellate Division and in such position the plaintiffs cannot maintain the present suit, 7 MLR(AD) 258, 53 DLR (AD) 12 = 53 DLR 29.

2. Res judicata in suit for perpetual injunctions:

See above under heading of decree in suit for permanent injunction does not operate as resjudicata.

3. Decree in suit for restoration of mere possession u/s. 9 does not operate as res judicata in latter suit for title or for khas possession:

In a suit u/s. 9 the decree does not operate as resjudicata so far as any other question apart from the point of time when dispossession occurred is concerned. The Legislature did not intend to give the proceedings u/s. 9 the character of finality which is essential to invest the decision with the character which will make it operative as *resjudicata*, on the question of title, PLD 1937 Lah 125, AIR 1955 Trip 13, 1989 CLC 1318. The proceedings

under this provision of law do not constitute a bar against any of the parties suing to establish his title to the property to recover possession thereof. PLD 2004 SC 20.No one, though entitled to sue u/s. 9, is bound to do so, and one can always bring a regular suit founded on title. AIR 1914 Law Bur 11, AIR 1935 Cal 646, PLD 1969 Kar 78. Where the plaintiff failed to get relief in a suit u/s. 9 of the Act he was not debarred from filing suit on the basis of title and recovery of possession, 2002 SCMR 1981. A party which fails to recover possession u/s. 9, would still have an alternative remedy of a regular suit for possession on the basis of title. 1992 CLC 2320, (1978) 80 Punj LR 337.

4. Res judicata in matters of maintenance & custody of minors:

A suit for maintenance for a specific period of time does not bar by the principle of resjudicata a second suit for maintenance of another/next period of time, 14 IC 403 (PC). A suit for maintenance was decreed for an amount of money. Thereafter, the plaintiff filed another suit for a higher amount of maintenance for the changed situations of concerned period. Such suit is not barred by resjudicata, ILR 1951 Bo 652, 54 DLR 175. Final custody order passed in first petition under Guardians and Wards Act, 1890 does not operate as res judicata. As the question relating to interest and welfare of children is always in state of flux, depending upon variation in parameters, AIR 2018 Hyd 150.

5. Resjudicata respecting appeals:

Govt. against the self-same judgment filed two appeals one was out of time by 1230 and another by 1596 days. First appeal was dismissed as being out of time. Govt. did not proceed further. But the second appeal was admitted by condoning the said delay. Held: Since one appeal is dismissed from the same judgment at the instance of self-same party appeal by self-same party cannot proceed. 22 BLT 1.

The rule of resjudicata applies to appeals and miscellaneous proceedings as well. When during the pendency of an appeal, a final judgment on the same issue is passed by a competent court in another

case it operates as resjudicata. AIR 1942 Mad 421. The general principles of resjudicata applies to appeals arising out of one proceeding on the basis that the order passed in another appeal which could be appealed from was allowed to go unchallenged, the decision of the appeal court will be resjudicata. AIR 1966 SC 1332.

6. Resjudicata in writ proceedings/jurisdiction:

If an issue was finally decided on merit in an earlier suit or even in a writ petition by the HCD, the same issue shall operate as resjudicata in view of the provision of sec. 11 of the Code, in a subsequently filed suit on the same issue, 54 DLR 310, AIR 1977 (SC) 392, AIR 1998 (SC) 2046. The general principle of *resjudicata* is applicable in the writ petition also, 17 DLR (SC) 105.The bar of *resjudicata* is applicable to writ proceedings on the general principle that there should be an end to litigation and that a person should not be vexed twice in respect of the same subject-matter. It will, however, depend on the facts of each case whether issues in the present proceeding were raised or could have been raised in the previous proceeding and whether the issues raised were earlier decided on merits, 42 DLR (AD) 126 = 10 BLD (AD) 52.

If a writ application is decided on merits as a contested matter the decision will operate as a resjudicata in a subsequent Writ petition, AIR 1961 (SC) 1457. Principles of res-judicata are applicable when issues are decided by the HCD in its writ jurisdiction not upon evidence but on affidavits and documents - Particular question was not raised in the earlier writ proceeding - Barred by constructive res-judicata in a subsequent proceeding between the parties, 27 DLR 541.The principle of res judicata is nowhere mentioned in the Constitution. But the principle of *resjudicata* as found in the CPC is also application to a writ petition involving dispute of civil nature and the principle should not be applied in a writ matter in terms of the Code but in substance, 57 DLR 171 (FB), 4 ADC 339.

More see this writer's book on Constitution and writ jurisdiction.

7. Res judicata in execution proceedings:

If the judgment debtor fails to raise the question of want of jurisdiction of the court in execution a decree in the previous stages of execution, he cannot raise the question for the first time at a later stage. Even in execution cases there may be res judicata by operation of principle analogous to the explanation IV to sec. 11, 2 DLR 347.A judgment-debtor is bound to raise all possible objections in answer to an application for execution u/o. 21 r. 11, and cannot be allowed to raise fresh objection in a subsequent stage of the execution proceedings when an application is made for attachment u/o. 21 r. 54, 11 DLR 151.When the decree-holder neglected to raise a claim, e.g. question of want of jurisdiction of the court, in first execution proceeding, he is debarred by principles of res judicata from raising the same claim in his second execution case, 2 DLR 205.A question decided in an earlier execution case will operate as *res judicata* in a subsequent execution case arising out of the same decree between the same parties, 10 DLR 277, 25 CWN 581, AIR 1966 SC 1194.

An execution case was rejected holding that "the application be rejected as time-barred". Subsequently upon another application, the executing court allowed the execution case to proceed. Held: The above quoted order is an order on merits. There being no appeal or review against that order, the court by its subsequent order was not competent to agitate that question over again. 9 DLR 399.

Stage of raising objection as to resjudicata:

The plea of res judicata being a plea of law could be raised at any time during the proceedings, and even in the appellate court, 2 DLR 205 PC, AIR 2016 SC 564. The doctrine of resjudicata refers not to the date of commencement of the suit but to the time when the judge is called upon to decide the issue. The rule is not limited to the court of first instance, but is also applies to the proceedings of the first and second Appellate Courts, 1 BLD (AD) 221. Once the conditions are satisfied and evidence is led on the point, even a party who might have waived the plea of resjudicata

in lower court may revive it at appellate stage. AIR 1978 Pat 235.Even though no such plea was raised in trial court, High Court may allow the plea. AIR 1949 PC 302.

Contrary situations – Where plea of res judicata was not raised in the High Court, it cannot be raised for the first time before the Supreme Court, AIR 2009 SC 2582.

Stage of determination of question of resjudicata, i.e. whether plaint can be rejected for being barred by resjudicata:

In our study, we find 3 kinds of views about in what stage the question of resjudicata will be determined; *such as* –

(i) Issue of resjudicata cannot be determined u/o. 7 r. 11; rather the matter shall be determined at trial by framing issue thereof;

(ii) Issue of resjudicata can be determined u/o. 7 r. 11 and plaint can be rejected only on the ground of resjudicata;

(iii) Plea of resjudicata should be decided on preliminary issue of maintainability u/o. 14 r. 2.

May we bring some discussions on these points –

(i) Ordinarily issue of resjudicata cannot be determined u/o. 7 r. 11; rather the matter shall be determined at trial by framing issue:

The principle of res-judicata is a mixed question of fact and law. The question of res-judicata cannot ordinarily be decided as a preliminary issue and it can only be decided on evidence. Where evidence is necessary to establish the plea of resjudicata, the plaint cannot be rejected on the ground of resjudicata, 2 ALR (AD) 152, 52 DLR (AD) 49 = 20 BLD (AD) 82, 16 BLD (AD) 279, 2 XP (AD) 36, 21 BLC 433, 22 BLC 288, 22 BLC 551, 2 ADC 146, AIR 2015 SC 3357.Ordinarily, a plaint should not be rejected u/o. 7 r. 11 on the ground of resjudicata unless it is so palpably clear and obvious from a meaningful reading of the plaint that no further evidence is required, 54 DLR 310, 13 BLD (AD) 217, 1 LNJ 97, 18 MLR 49 = 33 BLD 62.

More see u/o. 7 r. 11 under heading of Whether plaint can be rejected for being barred by resjudicata.

(ii) Contrary situations – Issue of resjudicata can be determined u/o. 7 r. 11 and plaint can be rejected only on the ground of resjudicata:

Rejection of plaint is not confined to the provision of Or. 7 r. 11 of CPC. In an appropriate case, while the proceeding itself is an abuse of the process of the court, the court having recourse of sec. 151 will be competent to reject the plaint or strike out part of the relief prayed for. Therefore, if it is so clear and palpable from a meaningful reading of the plaint that no further evidence is required, plaint may be rejected u/o 7, r. 11 only for *res judicata*, 24 BLD (AD) 223, 10 MLR (AD) 144, 10 MLR (AD) 90, 13 MLR 13, 20 BLD (AD) 278, 43 DLR 621, 11 MLR (AD) 169, 6 XP (AD) 113 = 5 ALR (AD) 68, 23 BLC 304.

More see u/o. 7 r. 11 under heading of Whether plaint can be rejected for being barred by resjudicata.

(iii) Third view; plea of resjudicata should be decided on preliminary issue of maintainability u/o. 14 r. 2:

In the instant case from the reading of the plant there is no such statements which can warrant a conclusion that the suit is barred by any law. In deciding the question of *resjudicata* can be gone into after the evidence are led by the parties and in that event the court as per or. 14 r. 2 can dispose of the case where issues of law is decided first leaving aside the issues of fact, 4 BCR 263. The learned Judge committed gross illegality in rejecting the plaint on the ground of resjudicata. However, if the defendant wants to boric the suit earlier he can frame special issue as per Or. 14. 4. 2 of CPC for a decision. 5 XP 121.